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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 413

GREENBELT COOPERATIVE PUBLISHING ASSOCIATION, INC., and ALFRED M. SKOLNIK,

Petitioners

v.

CHARLES S. BRESLER,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

The facts in the case are fully presented in the brief of the petitioners, particularly in Appendix A thereto (A. 1-24), and are therefore not repeated herein. The Court's attention is especially invited to pages A-2 and A-3, which contain a concise and accurate statement of the background relating to the two principal newspaper articles.

ARGUMENT

1. Public Official and Public Figure

Petitioners claim constitutional protection because respondent allegedly was both a public official and a public figure. Although the Court of Appeals of Maryland disagreed but accepted this premise *arguendo* (A. 31-32), none of the libelous publications contained any criticism of respondent's *official* conduct, either as a member of the Maryland House of Delegates from another county or (seven months after the "blackmail" articles) as a candidate for the office of Comptroller of Maryland. They are all directed at him as a private developer of land in the Greenbelt area.

Petitioners' statement of the Questions Presented cites only *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, which limited its application to the official conduct of public officials. In a separate concurring opinion in that case, Mr. Justice Goldberg, joined by Mr. Justice Douglas, said: "This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen."

In the later case of *Rosenblatt v. Baer*, 383 U.S. 75, 86, 86 S.Ct. 669, 676, the Court said:

> "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds its, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply."

And, as the footnote said:

> "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."

A State Delegate would hardly have "substantial responsibility for or control over the conduct of governmental affairs" (383 U.S. 85, 86 S.Ct. 676).

Subsequently, in *Time, Inc. v. Hill,* 385 U.S. 374, 390, 87 S.Ct. 534, 543, this Court counseled against ". . .blind application of *New York Times Co. v. Sullivan,* relating *solely* to libel actions by public officials. . ." (emphasis supplied).

Likewise, in *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 88 S.Ct. 197, *Garrison v. Louisiana,* 379 U.S. 64, *Henry v. Collins,* 380 U.S. 356, and *St.Amant v. Thompson,* 390 U.S. 727, the alleged libels pertained solely to the *official conduct* of the public officials concerned.

It was because of the continued insistence of petitioners that respondent was a public official and that strict adherence to the *New York Times* standard was required, that the trial court repeatedly gave the *New York Times* instruction pertaining to the

> "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. 279-280, 84 S.Ct. 726).

It is true that counsel for the respondent conceded in his *opening statement* that respondent was a public figure, as petitioners had certainly made him one in Greenbelt. However, it is also true that:

a. The trial court specifically instructed the jury that: "The Court will tell you that the opening statements or closing argument of counsel is not evidence." (E. 198) and repeated that admonition (E. 199).

b. The Plea and Answer filed by petitioners in the trial court asserted the constitutional defense of "public official" (E. 6), but not that of "public figure", although *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975,

had been decided six months before this case came to trial and, under the Maryland Rules, petitioners could readily have obtained leave of court to amend during that time.

c. Petitioners did not ask the trial court to instruct the jury that respondent was a public figure and a public official, or to define those terms for the jury.

2. Out of Context

Petitioners' principal contention is that they were denied the constitutional protection because the word "blackmail" was extracted out of context and given a meaning which is wholly foreign to the two articles in which that word appeared. Petitioners particularly complain in their brief (p. 17) of ". . . the court's total disregard for the context of the articles. . ." The record clearly disputes that contention:

a. The trial court specifically instructed the jury (A-42 and E. 189): "In considering the publication complained of, you must consider the publication as a whole . . . and how it would be understood by ordinary readers from the *entire context* thereof. . ." (emphasis supplied).

b. It was the petitioners who took the word "blackmail" out of context in the first article and printed it as a subheading in bold-face type (E. 212).

c. It was the petitioners' reporter who took the word "blackmail" out of context in the second article and gave it emphasis. As the reporter said (E. 152): ". . . I paraphrased his sentence but I selected out the word 'blackmail' was his word and I wanted to denote it was his word I was picking up. . .".

d. Dorothy Sucher, a witness for petitioners, who wrote the first "blackmail" article, admitted on cross-examination that ". . . I didn't use all my notes in writing the story" (E. 164), although she did use that part of her notes which quoted the speakers who used the words "blackmail" and "blackmailing scheme.".

e. Councilman David Champion (E. 212) and James Martin (E. 218) considered the accusations of "blackmail" serious enough to deny these charges before a heated audience (respondent was not there to defend himself).

As to the meaning and relevancy of the word "blackmail", petitioner Skolnik, who has three degrees including a Ph.D., said he knew blackmail "is somewhat in the category of a crime" (E. 32). Mayor Smith, a witness for petitioners, who presided at both reported City Council meetings, testified on cross-examination that "In my opinion there was nothing to justify the use of the word 'blackmail' by anyone from the audience" (E. 132).[1] Mary Louise Miller Williamson, the witness for petitioners who wrote the second "blackmail" article, testified that: "There is no connection as far as I can see between what Mr. Bresler, what the situation—the offer, there is no relation between that and a crime of blackmail. There is a difference" (E. 155). Mrs. Sucher, the first reporter, also knows that blackmail is a crime (E. 165).

The jury, having been instructed to consider the publication as a whole, must have determined that petitioners wanted the readers of the News Review to believe that respondent had been accused of the crime of blackmail, by publishing the charge in two editions of the newspaper, and by featuring the word "blackmail" in a subheading in heavy type for those who might miss the accusation in the body of the first article.

3. Accuracy

Petitioners claim constitutional protection on the ground that they published an accurate report of a public debate. The record shows otherwise.

The second "blackmail" article stated that "Albert Herling suggested skulduggery in the September court postpone-

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[1] The article pertaining to the second meeting (E. 217) noted that "The mayor occasionally had to caution them to refrain from engaging in personalities." Despite this, the newspaper quoted the "blackmail" and alleged "skulduggery" accusations.

ment" (E. 218). The word "skulduggery" is defined, among other things, as "dishonesty" (A. 36). When questioned about the use of that word in the second article, petitioner Skolnik said (E. 43): "All I am saying is there 'skulduggery' is the word that the reporter used to interpret what Mr. Herling was saying." Petitioner's testimony is contradicted by his own witness, Mrs. Williamson, the reporter, who said (E. 152): "I did not use that word. This is a good example of what happens on Tuesday night when the other members of the Editorial Board will read through an article." Mr. Skolnik was a member of the Editorial Board (A-2).

Another example of petitioners' deliberate falsity with intent to harm is the paragraph in the News Review article of June 9, 1966, which states (E. 223):

> "Reportedly, a number of home-owners, both in the Lakecrest and Boxwood developments, have started legal proceedings against Bresler for failure to make construction corrections in accordance with county standards."

Petitioners cannot claim that they were merely reporting a public meeting, as this was neither a public meeting nor a report of what was said there. In fact, the chairman said they wouldn't discuss the matter (E. 53-54), so the reporter, Mrs. Skolnik, spoke to the complainants after the meeting. Mr. Skolnik justified the use of the phrase "started legal proceedings against Bresler" in the following colloquy (E. 54):

> "What do you know about suits which were filed?
> A. About suits?
> Q. Yes. A. No, I don't know anything about suits. All I know is that people were complaining about the fact that they were having troubles—
> Q. But that isn't what your article said. Your article doesn't say a word about complaints. It says legal proceedings. A. Well, that covers complaints."

Petitioners contend that their failure to verify the undisputed testimony of respondent that no such legal proceedings had been filed against him (E. 94) constituted mere negligence. However, what was more important was that petitioners had deliberately falsified what the home-owners

had said. No one said he had "started legal proceedings against Bresler". That was the newspaper's own statement. And, the Maryland Court of Appeals properly held that this false charge was calculated to result in serious injury to Bresler's reputation as a builder and developer (A. 38).

Of collateral interest is the fact that petitioner Skolnik tried to evade responsibility by admitting that he and his wife were the joint authors of the foregoing article, but that his wife wrote the libelous paragraph (E. 53).

4. Instructions to the Jury

Petitioners complain of a single, allegedly erroneous, instruction to the jury—that which referred to "actual malice" as a "state of mind . . . best described as spite, hostility, or deliberate intention to harm".

As the Maryland Court of Appeals said (A. 41):

> "It is well settled in Maryland that in considering alleged errors in a charge of the trial court to the jury, we will consider the charge as a whole and will not select, out of the context of the whole charge, individual statements which might, of themselves and out of context, contain inartificial methods of expression or appear to be misleading."

In *Curtis Publishing Co. v. Butts*, 388 U.S. at 156-157, the Court said:

> "The impact of a jury instruction 'is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied.' *Seaboard Air Line R. v. Padgett*, 236 U.S. 668, 672, 35 S. Ct. 481, 482, 59 L.Ed. 777."

It was also stated in *Butts* that punitive damages require a finding of "ill will" under general libel law (388 U.S. at 161).

The opinion of the Maryland Court of Appeals in this case contains a comprehensive discussion of the trial court's instructions to the jury, as well as relevant portions of the opinions in *New York Times, Butts, Time,*

Inc. v. Hill, and references to *Rosenblatt v. Baer* and *Beckley Newspapers Corp. v. Hanks.* It is apparent from the trial court's instructions and the appellate court's opinion that both courts below had carefully considered and applied the federal rule pertaining to public officials announced in *New York Times* and reiterated in the subsequent cases, and as it was later applied to public figures in *Butts* and *Walker.*

The appellant court below commented on the trial court's instructions that: "Indeed in several instances the test was broader than that of *New York Times* as it was not always limited to a 'public official' or a 'public figure'." The appellate court further stated (A. 54):

> "In our opinion, the appellants suffered no prejudice from the instruction, considered as a whole, in this regard. If there was any prejudice, it was suffered by the plaintiff, not by the defendants."

To illustrate how far the trial court bent in its efforts to instruct the jury in language consistent with *New York Times* and the subsequent libel cases (and to satisfy petitioners' objections based on their "blind application of *New York Times Co. v. Sullivan*"), the trial court repeated the actual malice instruction as follows:

> E. 191–"And such statements repeated and/or published, unless with actual malice, or knowledge that they are false, reckless disregard for whether they are true or false, is not libel."
>
> E. 191-192–"The law recognizes the importance of free discussion and criticism and matter of public interest to the extent that it grants immunity even with respect to publication of foolish and prejudicial criticism if they are not published with malice, knowledge of their not being true, it is knowledge they are false, or reckless disregard of whether they are true or false."
>
> E. 192–"If you find that the publication complained of relates to a matter of interest to one or both of the parties to the publication or communi-

cation and that the means of publication was reasonably adapted to the protection of that interest, you are instructed that the publication is qualifiedly privileged and *your verdict should be for the defendant unless* you find that the publication was made with actual malice, knowledge of its falsity, or reckless disregard of whether it was true or false." (Emphasis supplied)

E. 192–"You are instructed the publication is qualified privileged and *your verdict should be for the defendant unless* you find again the publication was with actual malice, knowledge of its being false or reckless disregard of whether it was true or false." (Emphasis supplied).

E. 193–"Further, although honest indignation and strong words are not evidence of express malice, or actual malice, actual malice may also be present in the eyes of the law if you determine by a preponderance of the evidence that the defendant's conduct, published in the article complained of constituted malice, reckless disregard of whether they are true or false."

E. 197–"With the law that I have given you you are obligated to find malice, knowledge of the falsity, reckless disregard of what is true or false in order to find (for) the plaintiff."

E. 204–"The Court will give you one additional instruction as a matter of law, that in a suit for libel you have a treating differently of different people. A public official or a public figure, the law permits under the question of privilege or fair comment a wider latitude. In other words, in matters that are of general public interest, the articles complained of were, if you find by a preponderance of the evidence was public activities, there is a constitutional protection for publication of matters regarding a public official or a public figure. There is no denial in this case Mr. Bresler was not a member of House of Delegates and a candidate for Controller of the State of Maryland when the last article was published.

> And *the plaintiff cannot recover unless* you find, as I say again, by a preponderance of the evidence, that the articles were published with actual malice, knowledge of their being false or reckless disregard of whether they were true or not." (Emphasis supplied).

Following the above instruction, the trial court gave an additional clarifying instruction:

> E. 205—"Very well, the Court would add one thing. In reference to the last instruction I gave you, with reference to his official conduct *or* words as a public official or public figure."

Counsel for petitioners then engaged in a discussion with the trial court. Although he contends that respondent is both a public official and a public figure (petitioners' brief p. 13; E. 206), he said (E. 205); "I think the jury is going to be confused there, a public figure is not a public official. So how could you have official conduct that Your Honor has instructed to public official.", and further he said (E. 206): "I think they will confuse the jury because public figures are not officials and therefore do not have official conduct."

After lunch, and following a further colloquy between counsel for petitioners and the trial court, the trial court gave the following additional instruction:

> E. 209—"Very well, Mr. Foreman and gentlemen of the jury: The Court added to my original instruction regarding public officials, will include public figures, because in the manner which it was done I am of the opinion there may be some misconception of exactly what I meant with the original instructions as to public officials and public figures.
>
> I am going to give you the additional instruction, which is the law on this subject. There is no contention here that the statements regarding blackmail were true. The Constitutional guarantee requires a rule that prohibits a public official or public figure from recovering damages for defamatory falsehood

relating to his official conduct unless he proves that the statements were made with actual malice, that is with knowledge that it was false or with reckless disregard of whether it was false or not. *The same thing is said in the same vein, definition of malice is constitutionally insufficient where discussion of public affairs is concerned unless the plaintiff establishes that the utterances were false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true.*" (Emphasis supplied).

The final instruction was much broader than *New York Times* in its application to "discussion of public affairs", without any qualification or limitation. It could hardly have failed to impress the jury as the trial court's last words on the subject.

Petitioners also complain of a single refusal by the trial court to give the jury an additional instruction pertaining to petitioners' failure to verify the "started legal proceedings" article. The trial court did instruct the jury that petitioners had the right to rely "upon people which it knows or has very good grounds to believe are responsible citizens" (E. 191) and to consider "whether the publication was based on information received from persons whom the defendant believed to be reliable persons" (E. 196.) These two instructions, together with the frequently repeated instructions on knowledge of falsity or reckless disregard of the truth, should have been sufficient on the question—particularly since no one said he had "started legal proceedings against Bresler."

5. Relevancy.

Petitioners apparently contend that all published repetitions of any statements made during public debate are constitutionally protected by the federal rule, without regard to the relevancy of the statements. That is not what the Court said in *Curtis Publishing Co. v. Butts*, when it quoted *Time, Inc. v. Hill*, to the effect that ". . . freedom of dis-

cussion 'must embrace all *issues* about which information is *needed or appropriate*. . . '" (388 U.S. at 147, 87 S.Ct. at 1987) (Emphasis supplied). Former Chief Justice Warren also mentioned in that case (388 U.S. at 163) the right of the press and public to be informed on matters of *legitimate* interest, which would not appear to include false and irrelevant charges of blackmail.

Prosser, The Law of Torts, 2nd Edition, likewise said:

> "There is no privilege attached to . . . headlines which do not fairly reflect the gist of the text. . ." (Sec. 95, p. 625).
>
> "Thus qualified privilege does not extend, in any of the above cases, to the publication of irrelevant defamatory matter with no bearing upon the public or private interest which is entitled to protection:" (Sec. 95, p. 625).
>
> "It must rather be directed and confined to the facts which are a matter of public concern, and not go beyond them, as by attacking the personal character of the author of a book," (Sec. 95, p. 623).

In *Dorr v. United States,* 195 U.S. 138, 152, 153, the Court held that headlines are not privileged even though they head a privileged report of a judicial proceeding. As the Court said: "The report must also be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatsoever, in addition to what forms strictly and properly the legal proceedings." And as it said further: "And all sensational headings to reports should be avoided. . .These headlines were not privileged matter at the common law, and were libelous remarks or comments if the matter could be deemed otherwise privileged. . . . "

Petitioner Skolnik knew "blackmail" was a crime (E. 32). Petitioners' witness, Mayor Smith, testified that there was nothing discussed at either of the two meetings which justified the use of the word "blackmail" by anyone from the

audience (E. 132). Petitioners' witness, Mrs. Williamson, testified that there was no relation between Mr. Bresler's offer and the crime of blackmail (E. 155). Petitioners' witness, Mrs. Skolnik, testified that blackmail "could be a crime" and admitted that Mr. Bresler was not involved in the crime of blackmail as a result of what he was proposing to the City Council or Board of Education (E. 184-5). Nevertheless, respondents headlined, published, and re-published the blackmail accusation.

6. Ill Will

This case is somewhat unusual in that the New Review also published two articles which solicited funds for the filing of a suit against respondent. These articles falsely represented that the funds were to be used for a suit in equity for an injunction, when in fact they were used to finance the filing of a suit at law against the respondent and others, primarily for substantial damages and only incidentally for an injunction. As the Court of Appeals noted (A. 17), four of the plaintiffs withdrew before and during trial, and the trial court granted a motion for a directed verdict against the remaining plaintiffs. Ironically, the two reporters who wrote the "blackmail" articles testified that they had contributed to the legal fund, but neither Mrs. Williamson (E. 153) nor Mrs. Sucher (E. 167) knew the fund was to be used to try to collect damages in excess of $1,000,000. from the respondent and others. As a further irony, Mrs. Bergemann (who made the "blackmail" accusation in Mrs. Sucher's article) was the one who solicited Mrs. Sucher's dollar.

Petitioner Skolnik said that Mayor Smith had suggested the filing of suit (E. 67), but Mayor Smith said the suit wasn't discussed at any meeting he attended (E. 127).

When asked if he and his wife had assisted in any way in the collection of the legal funds, Petitioner Skolnik answered, "I don't recall any activity in that respect" (E. 62). When he was asked about the last paragraph of the article which

solicited assistance for the collection of these funds and listed three telephone numbers to call, he said: "The latter number is my wife's number" (E. 62). When asked further: "You don't have separate telephones", he said: "That is right" (E. 63). When queried about the second article which solicited assistance for collection and listed two telephone numbers, he answered: "One of the numbers is my wife's number" (E. 69).

Petitioner Skolnik admitted that it is not the duty or responsibility of a newspaper to solicit funds for the institution of suits (E. 63), and that he knew of no similar suits being supported by the legal fund (E. 80).

In *Curtis Publishing Co. v. Butts*, 388 U.S. at 161, 87 S. Ct. at 1994, the Court said:

> "Where a publisher's departure from standards of press responsibility is severe enough to strip from him the constitutional protection our decision acknowledges, we think it entirely proper for the State to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse. Moreover, punitive damages require a finding of 'ill will' under general libel law and it is not unjust that a publisher be forced to pay for the 'venting of his spleen' in a manner which does not meet even the minimum standards required for constitutional protection."

Petitioners' brief (p. 18) alleges that one of the lower court's "glaring departures from the holdings of this Court as to the meaning and substance of the *New York Times* rule" was "The lower court's . . . obvious adherence to the pre-*New York Times* standard of actual malice as consisting of 'hostility' or 'ill will' . . ." . Although petitioners contend that respondent is a public figure, they apparently reject the holdings of this Court in the post-*New York Times* case of *Curtis Publishing Co. v. Butts*, which dealt with a "public figure" rather than a "public official", particularly in its reference to "ill will" cited above.

7. Reasons for denying the writ.

Apart from the fact that the trial of this case took five days, a reading of the trial court's instructions to the jury shows that it tried to apply the holdings of all the libel cases decided by this Court; particularly *New York Times* and *Butts*. It instructed the jury in accordance with the strict edict of *New York Times*, even though it disagreed with petitioners and agreed with the majority opinion of Mr. Justice Harlan in *Butts* that "the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake." (388 U.S. at 155, 87 S.Ct. at 1991).

It is noteworthy that Chief Justice Warren, although he advocated strict adherence to the *New York Times* standard in his concurring opinion in *Butts*, joined in the dissenting opinion in *Time, Inc. v. Hill*, which said (385 U.S. 418 and 420, 87 S.Ct. 557 and 558): "But a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell . . . The English language is not so esoteric as to permit serious consequences to turn upon a supposed difference between the instructions to the jury and this Court's formulation."

If it is petitioners' contention that the judgment below should be reversed because, seven of the eight times the trial court gave the *New York Times* instruction, it omitted the magical words "that is" after the word "malice", the Court likewise omitted those words when it stated the federal rule in *Time, Inc. v. Hill* (385 U.S. at 387, 87 S. Ct. at 541).

The verdict of the twelve-man jury was obviously unanimous. The decision of the Court of Appeals of Maryland was unanimous. Petitioners show no justification for asking for the reversal of the judgment of both courts in their petition.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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